

6. Section 4(f)

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6.1. Overview

Section 4(f) of the Department of Transportation Act of 1966, recodified in 49 U.S.C. 303 and adopted in Federal Highways regulations in 23 CFR 771.135, is one of the most stringent national environmental protection laws. It requires that FHWA can only approve the use of land from a significant publicly owned park, recreational area, wildlife and waterfowl refuge, or significant historic site if:

1. There is no feasible and prudent alternative to the use of land from the property; and
2. The action includes all possible planning to minimize harm to the property resulting from the use.

6.2. Applicability

Section 4(f) applies to **all agencies** of the USDOT. Therefore, occasionally Section 4(f) will apply to a project due to the involvement of an agency other than the FHWA, even on projects that are solely state funded. For example, a state-funded bridge replacement project utilizing lands from a public park and requiring a Coast Guard permit would involve Section 4(f). Regardless of which agency of the USDOT leads, the requirements for Section 4(f) remain constant. Coordination in such cases, of course, is done through the lead agency for each particular project. For the purposes of this chapter, however, the FHWA is assumed to be the lead agency.

The applicability of Section 4(f) is based on a project's use of land from property that is a designated Section 4(f) resource. In order to determine the applicability of Section 4(f), therefore, not only must the property represent a Section 4(f) resource, but also the project or undertaking must entail a "use" of land from that property within the meaning of Section 4(f). **As a result, all Section 4(f) applicability**

determinations are made on a case-by-case basis.

The regional environmental coordinator makes the initial assessment as to whether a property is a Section 4(f) protected resource, but the FHWA makes the final determination. To aid them in making this decision, we provide the following general guidance for state environmental staff. For advice on specific situations or issues not covered below or in Appendix E, contact the state environmental coordinator.

6.3. Preparation and Process

6.3.1 Format and Organization

- Print the evaluation on 8 1/2 x 11-inch paper, with any larger sheets folded to that size.
- Wider sheets should be 8 1/2 inches high and should open to the right with the title or identification on the right. The standard size allows for administrative record keeping.
- Do not show consultant logos on any pages of text, figures, or tables in the evaluation.
- Use the following format for Section 4(f) Evaluations:
 - A. Title Sheet
 - B. Proposed Action
 - C. Section 4(f) Property
 - D. Impacts on the Section 4(f) Property(ies)
 - E. Avoidance Alternatives
 - F. Measures to Minimize Harm
 - G. Coordination
 - H. Appendices (if any)

Appendix E of this manual and the FHWA Environmental Guidebook provide detailed instructions on preparation and content of a Section 4(f) Evaluation. The link to the guidebook is: <http://www.fhwa.dot.gov/environment/guidebook/chapters/v2ch15.htm>

6.3.2 Process

The regional environmental coordinator should identify potential 4(f) resources in the project area. The coordinator must consult as soon as practicable with the FHWA environmental specialist to determine the applicability of Section 4(f). The potential "use" of Section 4(f) lands must be evaluated early so a full range of avoidance and minimization alternatives can

be evaluated early in the project development process. The regional environmental coordinator and the project design manager must consult with the FHWA environmental program manager to determine the range of alternatives that FHWA will require to be analyzed.

The evaluation of alternatives must provide sufficient information for FHWA to determine that there are unique problems or factors involved with the avoidance and minimization alternative that would preclude their selection. These factors could include extraordinary costs, substantial social, economic, or environmental impacts, or extraordinary community disruption.

The Section 4(f) requires an engineering analysis of alternatives in substantially greater detail than that required for the environmental document. The level of this detail can approach or even equal “final” design plans. Maintain consultation with the FHWA area engineer to ensure the level of detail is appropriate.

It is important that the regional environmental coordinator, design manager, and FHWA environmental specialist agree with the level of design detail necessary for the evaluation in order to avoid substantial project delays.

The first step in assessing Section 4(f) is to determine if a particular property is a Section 4(f) protected property. Then determine if the project would entail a “use” (either actual or constructive) of land from that property. The regional environmental coordinator makes an initial assessment as to whether a property is a Section 4(f) protected resource. The coordinator then consults with the FHWA environmental specialist, who makes the Section 4(f) applicability determination.

Programmatic Section 4(f) Evaluations

After the regional environmental coordinator determines that Section 4(f) applies to a particular action and property, he or she then determines if the project qualifies for one of the four Nationwide Programmatic Section 4(f) Evaluations. If so, prepare the Section 4(f) Evaluation and submit it to the FHWA Division Office for approval. It is important to note that the only difference in processing for a Programmatic Section 4(f) Evaluation is that it need not be circulated for review.

Individual Section 4(f) Evaluations

If the Programmatic Evaluation is not appropriate, prepare an Individual Section 4(f) Evaluation and process it as Draft and Final Section 4(f) Evaluations. Whenever possible (i.e., unless discovered after environmental document approval), process the Draft Section 4(f) Evaluation with the Environmental Assessment or Draft Environmental Impact Statement. Process the Final Section 4(f) Evaluation with the Finding of No Significant Impact (FONSI) or the Final Environmental Impact Statement (FEIS). (See Figures 6-1 and 6-2 for sample transmittal letters.)

Approval of the Final Section 4(f) Evaluation is by the FHWA Alaska Division Administrator and normally happens concurrently with the approval of the environmental document. A Section 4(f) Evaluation for a CE project is processed as a separate Draft and Final Section 4(f) Evaluation and must be completed before submitting the CE to FHWA for approval.

The Section 4(f) statutes do not establish any procedures for preparing Section 4(f) documents, for circulating them, or for coordinating them with other agencies. The FHWA, however, has developed such procedures (23 CFR 771.135 and T6640.8A), which establish an administrative record determination that there is no feasible and prudent alternative. They also provide for obtaining information from knowledgeable sources on feasible and prudent alternatives and on measures to minimize harm.

Numerous legal decisions on Section 4(f) have resulted in a USDOT policy that conclusions on no feasible and prudent alternatives and on measures to minimize harm must be well documented and supported. The Supreme Court, in the Overton Park case [*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)], ruled that determinations on no feasible and prudent alternative must find that there are unique problems or unusual factors involved in the use of alternatives or that the cost, environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

Appendix E gives details on the content and preparation of Section 4(f) documents.

6.4. Coordination

The regional environmental coordinator must consult with the official with jurisdiction or agency owning

the land or administering the land [i.e. Department of Interior (DOI), Housing and Urban Development (HUD), or the Department of Agriculture (USDA)]. For DOI and HUD, consultation occurs at the regional level, while consultation with the USDA occurs at the appropriate National Forest Supervisor level. For projects that use land from a state park or that would have an adverse effect on an historic site or archaeological site, consultation with the appropriate division within the Department of Natural Resources is required (i.e., SHPO or park superintendent). For state game refuges, consult with the Department of Fish and Game.

Document the results of the consultation in the Draft and Final Section 4(f) Evaluation as appropriate.

6.5. Distribution of Draft Section 4(f) Evaluation

Except for CE projects, where the Section 4(f) Evaluation is processed as a separate document, the Draft Section 4(f) Evaluation is circulated for review with the EA or DEIS. A 45-day review is required for all Draft Section 4(f) Evaluations, including those circulated with an EA or an EIS.

The regional environmental coordinator must ensure that those agencies consulted during development of the evaluation receive a copy of the Draft Section 4(f) Evaluation for review and comment.

6.6. Final Section 4(f) Evaluation

The Final Section 4(f) Evaluation must contain all the same information as the Draft Evaluation as well as the following:

1. A discussion of the basis for concluding that there are no prudent and feasible alternatives to the use of the Section 4(f) protected land
- A discussion of the basis for concluding that the proposed action includes all possible planning to minimize harm to the Section 4(f) property
2. A summary of the formal coordination with the Department of Interior (and/or appropriate "Interior" agencies and, as appropriate, USDA and HUD)
3. Copies of formal coordination comments and a copy of all relevant comments received on the draft and an analysis and response to questions raised
4. Where Section 6(f) lands are involved, the

position of the National Park Service and Department of Natural Resources on the land transfer

5. A concluding statement that "Based on the analysis contained in this Final Section 4(f) Evaluation, there is no feasible and prudent alternative to the use of land from the (*identify the Section 4(f) property*), and the proposed action includes all possible planning to minimize harm to the (*Section 4(f) property*) resulting from the use."

6.7. Approval of the Final Section 4(f) Evaluation

All Final Section 4(f) Evaluations require a legal sufficiency review by FHWA before they can be approved. The Western Resource Center conducts this review for the Alaska Division.

Until they have completed their review, the FHWA Alaska Division Office cannot approve the environmental document (i.e., CE, FONSI, ROD, or Re-Evaluation). The regional environmental coordinator should work closely with the FHWA environmental specialist to ensure that enough time is provided in the project schedule for their legal sufficiency review.

STATEWIDE DIVISION OF DESIGN AND ENGINEERING
SERVICES

PRELIMINARY DESIGN/ENVIRONMENTAL/
(Appropriate) REGION

(Date)

Mr./Ms. (Name)
FHWA Area Liaison
Federal Highway Administration
(Address)
(City), AK 99###

Subject: (Project Number)

Dear Mr./Ms. (Name):

Enclosed are six copies of the Draft Section 4(f) Evaluation for the subject project as required by the National Environmental Policy Act of 1969 and submitted in compliance with 49 U.S.C. 303.

Please advise us of your actions so that we may proceed with the project.

Sincerely,

(Name)

Regional Environmental Coordinator

Enclosures: Six copies of Draft Section 4(f) Evaluation

cc: (Name), Design Manager

6860 GLACIER HIGHWAY

JUNEAU, ALASKA 99801-7999

PHONE: (907) ###-####

TEXT: (907) ###-####

FAX: (907) ###-###

Figure 6-1

Sample Transmittal Letter to FHWA for Draft Section 4(f) Evaluation

STATEWIDE DIVISION OF DESIGN AND ENGINEERING 6860 GLACIER HIGHWAY
SERVICES JUNEAU, ALASKA 99801-7999
PRELIMINARY DESIGN/ENVIRONMENTAL/ PHONE: (907) ###-####
(Appropriate) REGION TEXT: (907) ###-####
FAX: (907) ###-###

(Date)

Mr./Ms. (Name)
FHWA Area Liaison
Federal Highway Administration
(Address)
(City), AK 99###

Subject: (Project Number)

Dear Mr./Ms. (Name):

Enclosed are six copies of the Final Section 4(f) Evaluation for the subject project as required by the National Environmental Policy Act of 1969 and submitted in compliance with 49 U.S.C. 303.

Please advise us of your actions so that we may proceed with the project.

Sincerely,

(Name)
Regional Environmental Coordinator

Enclosures: Six copies of Final Section 4(f) Evaluation

cc: (Name), Design Manager

Figure 6-2
Sample Transmittal Letter to FHWA for Final Section 4(f) Evaluation